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84-2007

No. _____

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IN THE

Supreme Court of the United States

October Term, 1984

KENNETH THOMPSON,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

I. Whether the petitioner has made out a case of selective prosecution?

II. Whether the District Court for the Western District of Pennsylvania and the Third Circuit Court of Appeals have correctly interpreted and applied this Honorable Court's holding in *Roberts v. United States*, 445 U.S. 552 (1980)?

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KENNETH THOMPSON,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

No opinion was written by the United States District Court for the Western District of Pennsylvania. Petitioner filed separate appeals to the United States Court of Appeals for the Third Circuit at No. 84-3512 and No. 84-3648. Said Honorable Court issued memorandum opinions in each case, and copies thereof are set forth in the Appendix at 1a and 4a respectively. The opinion entered at No. 84-3512 was amended by Order dated April 24, 1985, a copy of which is set forth in the Appendix as 10A.

Statement of Jurisdiction

The United States Court of Appeals for the Third Circuit entered the judgment sought to be reviewed on March 29, 1985, affirming the Petitioner's Conviction and Sentencing in the United States District Court for the Western District of Pennsylvania. Petitions for rehearing with suggestion for rehearing *en banc* were filed by the Petitioner. The United States Court of Appeals for the Third Circuit entered orders denying such Petitions at No. 84-3512 and No. 84-3648 on April 24, 1985 and April 26, 1985, respectively.

Section 1254(1) of Title 28, United States Code, confers jurisdiction upon the United States Supreme Court to review the final judgments of the Third Circuit Court of Appeals by Writ of Certiorari. Pursuant to Rule 20.4 and 29.1 of the United States Supreme Court, the time for filing a petition for Writ of Certiorari from the judgment at No. 84-3512 began to run on April 24, 1985, and expires on June 24, 1985. At No. 84-3648 the time for filing began to run on April 26, 1985, and expires on June 25, 1985.

Constitutions and Statutes Involved

The Petitioner was charged and sentenced under the following statutes:

Title 18, United States Code, Section 2:

> (a) Whoever commits an offense against the United States or aid, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.
>
> June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, §17b, 65 Stat. 717.

Title 21, United States Code, Section 841(a)(1):

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Title 21, United States Code, Section 846:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
>
> Pub.L.91-513, Title II, §406, Oct. 27, 1970, 84 Stat. 1265.

Statement of the Case

Petitioner, Kenneth Thompson, was charged in a two count indictment with possession and delivery of cocaine and conspiracy to do so in violation of Title 21 United States Code, Sections 841(a)(1) and 846, and Title 18 United States Code, Section 2.

Thompson entered a conditional plea to said charges on July 5, 1984. The plea was on condition that he be permitted to preserve the issues raised in his pre-trial motions which were denied by the trial court on July 5, 1984. On August 13, 1984, Petitioner was sentenced to a consecutive five year prison term on each of the two counts, and was also given a three year special parole term on the last count. Thompson timely filed a Motion to Modify or Reduce Sentence which was denied by Order dated September 24, 1984.

The Petitioner filed timely appeals to the above judgment, sentence and order at No. 84-3512 and No. 84-3648. The jurisdiction of the United States Court of Appeals was involved under Title 28, United States Code, Section 1291. Memorandum opinions at each of the above docket numbers affirming the judgment and sentence of the District Court were filed on March 29, 1985. Petitions for rehearing with suggestion for rehearing *en banc* were timely filed, and denied by the United States Court of Appeals for the Third Circuit at No. 84-3512 and No. 84-3648 on April 24, 1985 and April 26, 1985, respectively.

It should be noted that on or about March 28, 1984, the Petitioner herein was arrested by the Allegheny County Police and charged in the Courts of the Commonwealth of Pennsylvania with sale and delivery of cocaine, possession of cocaine with intent to deliver, possession and conspiracy.

Immediately following his arrest, and prior to retaining an attorney, the Petitioner was asked by the county detectives whether he would be willing to cooperate with the police in order to achieve further drug-related arrests and convictions. Petitioner initially indicated a willingness to so cooperate. Thereafter, on March 29, 1984, he was released from custody on a bond of $3,000.00 straight. A preliminary hearing on the charges was set as per standard procedures.

On or about March 29, 1984, the Petitioner retained the services of William E. Stockey, Esquire, for the purpose of defending him on these charges. The Petitioner also changed his mind on the subject of cooperation with the police, and Mr. Stockey duly informed the detectives of that decision. This change in circumstances was followed by changes in the prosecution of these charges. His bond was raised to $20,000.00 straight (App. 101a). The preliminary hearing which was scheduled for April 17, 1984 was postponed until late May. On April 27, 1984, the Appellant was indicted by a federal grand jury on charges identical to those filed in state court. The charges were, in effect, transferred from state to federal court, as the state charges were never pursued following the federal indictment.

REASONS FOR GRANTING THE WRIT

I. This case presents the question of whether the United States engages in selective prosecution where the United States Attorney's Office disregards its own standards for asserting jurisdiction in order to pressure a criminal defendant into cooperating with police officials in further investigation.

In referring to the test for selective prosecution at page 4 of its memorandum opinion at No. 84-3512, the Court of Appeals for the Third Circuit holds:

> "Defendant's bald assertions do not meet the test. He has failed to make any factual showing of vindictiveness and reprisal by federal authorities. At most, he has alleged improper motivation by state authorities, which affords no basis for dismissal of the federal indictment."

The Petitioner contends that the above holding constitutes a misreading of the record below, and a failure on the part of the Third Circuit to fully and fairly address the important issues which this case presents.

The finding that no factual showing of vindictiveness and reprisal by the federal authorities is contradicted by the record. This Honorable Court is bound by the assumption made by the trial Court that the United States Attorney violated its own policies in having this case transferred to Federal Court. While this violation, in and of itself, may not justify dismissal, it is proof positive that others similarly situated have not generally been proceeded against by federal authorities. As such, the first requirement for showing selective prosecution was met, and the case far exceeds one of "bald assertions".

As to whether the transfer from state to federal was insidious or in bad faith, it should first be pointed out that the Government has yet to come forth with an explanation or justification of that action. Where this Court is bound by the assumption that the Federal Law Enforcement Plan for the Western District of Pennsylvania was violated, the Government should not be permitted to hide behind the presumption that a criminal prosecution is undertaken in a good faith manner.

The only explanation of record for the transfer in this case is that supplied by the Petitioner. He testified that the arresting officers threatened to transfer his case to Federal Court should he contest the charges and refuse to cooperate. This was in fact done, and it is proof that the federal prosecution was commenced invidiously and in bad faith, *i.e.*, for the purpose of exerting control over the Defendant's constitutional rights. In exercising his discretion to commence proceedings in such a way as to help state law enforcement officials exert control over a defendant's constitutional rights, and in commencing such proceedings in violation of his own policies, the Federal prosecutor acted with the same bad faith as did the state authorities.

As such, purposeful and bad faith discrimination on the part of the Federal prosecutor has been shown.

II. This case provides this Honorable Court with the needed opportunity to review the interpretation and application of its decision in *Roberts vs. United States*, 445 U.S. 552 (1980).

The Petitioner contends that the interpretation of *Roberts v. United States*, 100 S.Ct. 1358, 445 U.S. 552, 63 L.Ed.2d 622 (1900), which has been adopted by the Third Circuit Court of Appeals goes far beyond the intent and limitations of this Honorable Court's opinion in *Roberts, supra.* The Third Circuit affirmed what amounts to a knee-jerk reaction made by the District Court for the Western District of Pennsylvania where it imposed a sentence upon the Defendant which was far, far in excess of the norm for similarly situated Defendants where the arresting authorities baldly asserted that the Defendant refused to cooperate. The District Court so punished the Defendant for refusing to cooperate without the inquiry into the reasons for the Defendant's refusal to cooperate which *Roberts* contemplates, and despite the fact that the District Court was made aware that the Defendant refused to become an undercover police operative out of fear for the safety of his family and himself. *Roberts, supra,* clearly requires a hearing on the issue of cooperation with police authorities where the sentencing court is considering an augmentation of the Defendant's sentence for failure to cooperate. Some of the issues which should be addressed are the extent of a Defendant's ability to help the investigating authorities, the reasonableness and likelihood of a Defendant's asserted fears of retaliation, and the reasonableness of the requests for cooperation being made of the Defendant. The District Court did not conduct such an inquiry, and the affirmation of an augmented sentence by the Third Circuit in the absence of such an inquiry disregards and arguably eliminates

the need for such an inquiry notwithstanding the limitations of the *Roberts* opinion. It is respectfully submitted that the application of the *Roberts* opinion made by the District Court for the Western District of Pennsylvania and by the Third Circuit Court of Appeals far exceeds the intent of this Honorable Court, and disregards the limitations of its holding in *Roberts*. The practice of augmenting sentences for refusal to cooperate is problematical at best, and it is respectfully submitted that this Court should assert jurisdiction in this matter in order to more clearly define the duties of the sentencing court in this difficult area.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Honorable Court should grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Dated: June 20th, 1985

Respectfully submitted,

P. ANDREW DIAMOND, ESQUIRE
Attorney of Record for Petitioner

Certificate of Service

I, P. ANDREW DIAMOND, a member of the Bar of this Court, hereby certify that a true and correct copy of the foregoing Petition For Writ Of Certiorari to the United States Court of Appeals for the Third Circuit were mailed this day to the following:

Alan Johnson, Esquire
United States Attorney for the
Western District of Pennsylvania
633 USPO & Courthouse
Pittsburgh, Penna. 15219

Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

Sally Mrvos, Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Penna. 19106

Dated: June 21st, 1985

LEWIS AND STOCKEY
P. ANDREW DIAMOND, ESQUIRE
Attorney of Record for Petitioner

Certification of Bar Membership

I, P. ANDREW DIAMOND, whose name appears on this Petition For A Writ Of Certiorari, hereby states that I am a member of the bar of the Supreme Court of Pennsylvania and that I have been admitted to practice before this Court on April 14, 1980.

Respectfully submitted,

P. ANDREW DIAMOND, ESQUIRE
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(412) 391-0818

APPENDIX

Memorandum Opinion of the Court
Filed March 29, 1985

Not for Publication

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 84-3648

THE UNITED STATES,

vs.

KENNETH J. THOMSON, a/k/a BUTCH,
FRANK MANCINI, and REBECCA LAUDA,

KENNETH J. THOMSON, a/k/a BUTCH,
Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. 84-00073)
District Judge: Hubert I. Teitelbaum.

Submitted Under Third Circuit Rule 12(6)
March 28, 1985

Before: ALDISERT, *Chief Judge,* SLOVITER,
Circuit Judge, and STAPLETON,
*District Judge**

(Filed Mar 29, 1985)

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* Hon. Walter K. Stapleton, Chief Judge of the United States District Court for the District of Delaware, sitting by designation.

Appendix—Memorandum Opinion of the Court
Filed March 29, 1985.

MEMORANDUM OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Appellant Kenneth J. Thomson entered a conditional plea of guilty to the two counts of an indictment in which he was charged. Count One charged a conspiracy to distribute cocaine in violation of 21 U.S.C. §§841(a)(1) and 846, and Count Three charged him with possession and distribution of cocaine in violation of 21 U.S.C. §841(a)(1). He was sentenced to consecutive five-year prison terms on each of these counts, and was also given a three-year special parole term on Count Three. Appellant then filed a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure to modify or reduce the sentence. He claimed that the sentence of ten years' imprisonment is disproportionately severe based upon his background, the gravity of the offense, and the sentences imposed on other criminals in the Western District of Pennsylvania and sentences imposed for the same crime in other jurisdictions. He contended that the sentence imposed constitutes cruel and unusual punishment in contravention of the Eighth Amendment of the United States Constitution. The district court denied the motion and the defendant appeals.

Our scope of review of the district court's denial of a motion for reduction of sentence is limited to whether the district court abused its discretion. The sentence is within the limit set by the law. The fact that other defendants who have committed similar offenses may have received lesser prison terms does not constitute the imposition of this particular sentence an abuse of discretion.

Appellant also contends that the district court erred in considering his refusal to cooperate with the arresting officers in further investigations in determining the length of his sentence. Defendant recognizes that a similar contention was rejected by the Supreme Court in *Roberts v. United States*, 445 U.S. 552 (1980). In that case, the Supreme Court stated that "gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship." *Id.* at 558. The Court held that a defendant's declination to cooperate is a relevant fact available to a sentencing judge. We are bound to follow the holding of the majority of that Court, rather than the concurring or dissenting opinions upon which appellant relies.

For the foregoing reasons, the judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

DOLORES K. SLOVITER
Circuit Judge

Memorandum Opinion of the Court
Filed March 29, 1985

Not for Publication

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 84-3512

THE UNITED STATES,

v.

KENNETH J. THOMSON, a/k/a BUTCH,
FRANK MANCINI and REBECCA LAUDA,

KENNETH J. THOMPSON, a/k/a BUTCH,
Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. 84-00073-01).
District Judge: Hubert I. Teitelbaum.

Submitted Under Third Circuit Rule 12(6).
March 28, 1985.

Before: ALDISERT, *Chief Judge,* SLOVITER,
Circuit Judge, and STAPLETON,
*District Judge**

(Filed Mar 29, 1985)

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* Hon. Walter K. Stapleton, Chief Judge of the United States District Court for the District of Delaware, sitting by designation.

Appendix—Memorandum Opinion of the Court
Filed March 29, 1985.

MEMORANDUM OPINION OF THE COURT

SLOVITER, *Chief Judge.*

Kenneth Thomson appeals from his conviction following a guilty plea for violations of 21 U.S.C. §§846 and 841(a)(1) (1982) (conspiracy to distribute cocaine) and 21 U.S.C. §841(a)(1) (1982) (possession with intent to distribute cocaine). In seeking to have these charges dismissed, or, alternatively, a new trial based on the district court's failure to exclude evidence of wiretapped telephone conversations, the defendant presents two arguments.

First, defendant contends that the trial court should have dismissed the indictment because the case was wrongfully "transferred" from state to federal court as a result of his refusal to cooperate with state authorities which resulted in the transfer of his case to the federal system. He claims that this "transfer" violated federal policies as set forth in an in-house document entitled The Federal Law Enforcement Plan. Second, defendant urges that the consent of a police informant to wiretapped telephone conversations which implicated defendant was not voluntary and was the product of illegal police conduct.

Thomson was arrested by the Pennsylvania state authorities following his sale of approximately one-half pound of cocaine to detectives posing as drug purchasers. He alleges this transaction was arranged with the aid of an informant. Thomson was charged in the Pennsylvania courts with possession, conspiracy, and possession with intent to deliver cocaine. Initially, he agreed to cooperate in similar narcotics investigations, and in exchange was given a low bond set at $3,000. He contends that when he changed his mind and refused to cooperate and instead retained counsel to defend the

state charges, his bail was raised to $20,000 and he was prosecuted by the federal authorities.

Defendant has failed to make a threshold showing of impropriety on the part of the federal prosecutors. It is generally presumed that a criminal prosecution is undertaken in good faith and in a nondiscriminatory manner. *See United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973). The burden of proving selective prosecution is on the defendant who is required to make some showing that there is a "colorable entitlement" for such a claim. *United States v. Berrigan*, 482 F.2d 171, 181 (3d Cir. 1973). We have said that, "[s]ome credible evidence must be adduced indicating that the government intentionally and purposefully discriminated against the defendant by failing to prosecute other similarly situated persons." *United States v. Torquato*, 602 F.2d 564, 570 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979). The requirements for a defendant's *prima facie* case of selective prosecution were outlined in *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974), where the court said that the defendant must show:

> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Id. at 1211. *Accord United States v. Sun Myung Moon*, 718 F.2d 1210, 1229 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 2344 (1984).

Defendant's bald assertions do not meet this test. He has failed to make any factual showing of vindictiveness and reprisal by the federal authorities. At most, he has alleged improper motivation by the state authorities, which affords no basis for the dismissal of the federal indictment.

Similarly, defendant's argument that his indictment should have been dismissed due to the federal prosecutors' failure to follow guidelines established in an internal document has no merit. The government's internal policy regarding dual and/or successive state and federal prosecutions operates as a guideline for the exercise of its prosecutorial discretion. The courts have uniformly held that it does not give a criminal defendant any substantive rights. *See United States v. Ng*, 699 F.2d 63, 71 (2d Cir. 1983), and cases listed therein. It follows that violation of that policy would not be a basis to dismiss the indictment. *Id.*

With respect to defendant's second contention relating to the motion to suppress monitored telephone conversations, the Supreme Court has stated that the voluntariness of a person's consent to the recording of telephone conversations is a question of fact which a court must determine from the totality of the circumstances. *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). "[C]onsent will be considered voluntary if, from the totality of the circumstances, the trial court determines that the party agreeing to a wiretap did so consciously, freely, and independently and not as the result of a coercive overbearing of his will." *United States v. Kelly*, 708 F.2d 121, 125 (3d Cir.), *cert. denied*, 104 S. Ct. 279 (1983).

Appendix—Memorandum Opinion of the Court
Filed March 29, 1985.

The police informant who ultimately gave consent to the telephone interception did testify that an arresting officer threatened to hit him in the head with a mirror if he attempted to flee from the scene of the arrest. However, the consent to record the telephone conversations was given four days later, and the witness testified that he was not afraid at that time. The witness testified that he freely and voluntarily consented to have his conversation monitored, he signed a document so stating, and the district court so found. That factual finding was not clearly erroneous. *See United States v. Faison*, 679 F.2d 292, 298 n.5 (3d Cir. 1982). Since consent to the telephone interception was valid and voluntary under both the Pennsylvania wiretapping statute, 18 Pa. Cons. Stat. Ann. §5701 *et seq.* (Purdon 1983) and under applicable federal law, 18 U.S.C. §2511(2)(c) (1982), the monitored telephone conversations were properly admitted.

For the foregoing reasons, we will affirm the judgment of conviction.

TO THE CLERK:
Please file the foregoing opinion.

DOLORES K. SLOVITER
Circuit Judge

Order Amending Memorandum Opinion
Filed March 29, 1985

Not for Publication

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 84-3512

THE UNITED STATES,

v.

KENNETH J. THOMSON, a/k/a BUTCH,
FRANK MANCINI and REBECCA LAUDA,

KENNETH J. THOMSON, a/k/a BUTCH,
Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania.
(D.C. Crim. 84-00073-01).
District Judge: Hubert I. Teitelbaum.

Submitted Under Third Circuit Rule 12(6).
March 28, 1985.

Before: ALDISERT, *Chief Judge,* SLOVITER,
Circuit Judge, and STAPLETON,
*District Judge**

(Filed Mar 29, 1985)

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* Hon. Walter K. Stapleton, Chief Judge of the United States District Court for the District of Delaware, sitting by designation.

Appendix—Order Amending Memorandum Opinion Filed March 29, 1985.

ORDER AMENDING MEMORANDUM OPINION

It is hereby ORDERED that the not-for-publication memorandum opinion in the above case be amended to change the word "days" in the second sentence of the first full paragraph on page 5 and substitute therefor the word "hours" and to add two footnotes so that the first full paragraph on page 5 reads as follows:

> The police informant who ultimately gave consent to the telephone interception did testify that an arresting officer threatened to hit him in the head with a mirror if he attempted to flee from the scene of the arrest. However, the consent to record the telephone conversations was given four hours latter,[1] and the witness testified that he was not afraid at that time. The witness testified that he freely and voluntarily consented to have his conversation monitored, he signed a document so stating, and the district court so found.[2] That factual finding was not clearly erroneous. *See United States v. Faison*, 679 F.2d 292, 298 n.5 (3d Cir. 1982). Since consent to the telephone interception was valid and voluntarily under both the Pennsylvania wiretapping statute, 18 Pa. Cons. Stat. Ann. §5701 *et seq.* (Purdon 1983)

and under applicable federal law, 18 U.S.C. §2511(2)(c) (1982), the monitored telephone conversations were

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[1] The statement in the government's brief that the consent form was signed four days later, Brief for the United States at 11, is not supported by the evidence.

[2] After a hearing on this issue, the district court denied the motion to suppress the evidence of the telephone conversation finding that "whatever else might have happened, this man did agree to have these conversations monitored, and they were." App. at 81a.

By the Court,
DOLORES K. SLOVITER
Circuit Judge

Dated: April 24, 1985.